Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1401

OHIO COUNTY AND INDEPENDENT AGRICULTURE SOCIETIES, DELAWARE COUNTY FAIR, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC. WASHINGTON, D.C.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Ohio County and Independent Agriculture Societies, Delaware County Fair, respectfully prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 12, 1979, which affirmed an order of the Tax Court of the United States, entered July 14, 1977 which dismissed a declaratory judgment petition for lack of jurisdiction.

OPINION BELOW

The opinion and order of the United States Tax Court (Appendix A), is not officially reported.

The opinion of the Court of the Sixth Circuit Court of Appeals (Appendix B), is not officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered December 12, 1979. The petition for a writ of certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The declaratory judgment act (Section 7428 of the Internal Revenue Code of 1954) provides for judicial review of determinations made by the Internal Revenue Service with respect to a controversy concerning the initial or continuing tax exempt status of an organization, under 501(c)(3) of the Internal Revenue Code.

Should the ambit of declaratory judgments under Section 7428 be limited to organizations seeking status as a 501(c)(3) organization denying relief to organizations seeking to avoid such status?

STATUTE INVOLVED

Section 7428 of the Internal Revenue Code of 1954. Declaratory Judgments Relating to Status and Classification of Organizations Under Section 501(c)(3), etc.

This section was added to the Internal Revenue Code of 1954 by Sec. 1306(a) of Public Law 940455 (Oct. 4, 1976), known as the Tax Reform Act of 1976.

STATEMENT OF THE CASE

This is a case of first impression in the interpretation of Section 7428 with respect to an organization seeking to vitiate initial, and seeking a denial of, continuing exempt status under 501(c)(3).

"The Delaware County Agricultural Society is organized and operated under a constitution and by-laws as a subordinate unit of State of Ohio, Department of Agriculture."

This is the beginning line in the original report of examination of petitioner by an agent of the United States Internal Revenue Service and reiterated by the government in its brief to the Sixth Circuit Court of Appeals. (The full official name of Ohio County and Independent Agricultural Societies, Delaware County Fair was not there used).

This is the only fact on the record in this case.

Facts which would have been proven had jurisdiction not been denied by the Tax Court would have included the following:

Appellant is not and never was an organization described under Section 501(c)(3).

It is an instrumentality of the State of Ohio as described in Section IRC 170(b)(1)(A)(v) which is not a category set out in Section 501(c)(3).

The Ohio Department of Agriculture on February 16, 1959, through the Secretary of Agriculture made application on Internal Revenue Form 1024 for a group exemption for independent fairs including, without destinction, county agricultural organizations which are instrumentalities of the State of Ohio.

By bureaucratic fiat on June 30, 1960, the Commissioner of Internal Revenue determined that Ohio fairs

were in fact, educational institutions and granted group exemption under Section 501(c)(3). The appropriate application which should have been filed as the basis for such a determination, Form 1023, was never filed by the State of Ohio or Appellant as a subsidiary of such state, or in any other way.

Apellant never signed or applied for inclusion under this or any group ruling. This is a condition precedent to being exempt under the Internal Revenue Service Regulations under 501(c)(3).

REASONS FOR GRANTING THE WRIT

The interpretation of Section 7428 is substantial and important. The decision of the Tax Court in this case, if allowed, to stand would deminish and restrict the relief granted by Congress by this section to a narrow category of organizations, a limitation clearly not intended by Congress.

ARGUMENT

Section 7428(a) of the Internal Revenue Code of 1954 grants jurisdiction to the United States Tax Court to issue declaratory judgments in cases concerning "actual controversies involving - (1) a determination by the Secretary - (A) with respect to the initial qualification or continuing qualification of an organization as an organization described in Section 501(c)(3). . . ." In the court below Appellee maintained that the requisite controversy cannot exist when the Commissioner determines that the Appellant *is* an organization described in Section 501(c)(3) of the Internal Revenue Code. Appellant however controverts such determination by maintaining that it is *not* an organization described in Section 501(c)(3) but *is* an instrumentality of the State of Ohio within the meaning of Section 170 (b)(1)(A)(v) and

therefore immune from the taxes, regulations, supervision and filing requirements imposed on Section 501 (c)(3) organizations.

Appellee would apparently have the court limit the application of Section 7428 to controversies where the Secretary has determined that an organization is *not* a 501(c)(3) organization and that the section would not apply where organizations seek to avoid qualification as a 501(c)(3) organization. However, the clear language of Section 7428 indicates that any controversy involving the Secretary's determination with regard to a 501(c)(3) qualification, whether it be for qualification or against it, is sufficient to invoke the jurisdiction of the United States Tax Court.

In denying jurisdiction in this case, the Tax Court judicially added to the statute a provision that relief was restricted to those organizations seeking to retain exempt status. This is not true.

No legislative intention needs to be invoked when the words of the statute are clear.

Appellee has in its briefs advanced assumed theories based upon unproven facts. Appellant seeks to meet any and all issues but only upon proven facts placed upon the record.

CONCLUSION

The decision of the Tax Court is clearly erroneous in holding that there is "no issue" and in continuing exempt status of appellant when the whole case is based upon a request for denial of exempt status.

The decision below should be reversed and this case remanded for trial of the issues in accordance with the clear terms of Section 7428.

Respectfully submitted,

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APPENDIX

APPENDIX A
UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

Docket No. 4811-77 X

OHIO COUNTY AND INDEPENDENT AGRICULTURE SOCIETIES, DELAWARE COUNTY FAIR *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

This case was called from the calendar for the Motions Session of the Court on July 13, 1977 at Washington, D.C., for hearing on respondent's motion to dismiss for lack of jurisdiction, filed June 9, 1977, upon the ground that the declaratory judgment procedures are not applicable as petitioner's continuing qualification as an organization described in Internal Revenue Code of 1954, Section 501(c)(3) is not in dispute. The petitioner filed with the Court a memorandum in opposition to respondent's motion. The parties were heard on the motion. After due consideration and for cause appearing in the transcript of the proceedings, it is

ORDERED that respondent's motion to dismiss filed June 9, 1977 is granted and this case is dismissed for lack of jurisdiction.

/s/ DARRELL D. WILES
Judge

Entered: July 14, 1977

APPENDIX B

NO. 77-1680

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO COUNTY AND INDEPENDENT AGRICULTURE SOCIETIES, DELAWARE COUNTY FAIR, *Plaintiff-Appellant,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Defendant-Appellee.*

ORDER

BEFORE: MERRITT and BROWN, Circuit Judges, and PECK, Senior Circuit Judge.

Appellant, Ohio County and Independent Agricultural Societies, Delaware County Fair, was determined by the Commissioner of Internal Revenue in 1960 to be entitled to tax treatment under §501(c)(3) of the Internal Revenue Code which meant that it was exempt from federal income tax as an educational organization and that contributions to it are deductible under §170(c)(2). However, as such an organization it is subject to such tax with respect to its "unrelated business income" pursuant to §§511 through 515 of the Code. Contending that it is entitled to more favorable tax treatment under the Code, i.e. that its unrelated business income not be subject to federal income tax, it filed a declaratory judgment proceeding in the Tax Court. In its petition in the Tax Court appellant asserted that it qualified as "an organization described in Section 170(b)(1)(A)(v)" of the Code and relied on §7428 of the Code for jurisdiction. The Tax Court entered an order (Docket No. 4811-77) dismissing appellant's petition, holding that it had no jurisdiction under §7428 of the Code and thus this appeal.*

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* Appellant is also raising the issue of its entitlement to be treated as an organization described in §170(b)(1)(A)(v) in a pending proceeding to redetermine a deficiency in the Tax Court.

We conclude that the Tax Court was correct in its decision that §7428 of the Code did not vest it with jurisdiction.

The legislative history clearly shows that §7428 was enacted to obviate a particular problem. This problem arose when organizations claiming entitlement to treatment or to continued treatment under §501(c)(3) (which appellant already has) were turned down, and a long period of time would expire before they could obtain a definitive determination. Thus Congress enacted §7428 to give the Tax Court declaratory judgment jurisdiction to make such determination. Moreover, the very language of §7428 provides that the Tax Court would have jurisdiction where there is a case in controversy involving a determination by the Secretary "with respect to the initial qualification or continuing qualification of an organization described in Section 501(c)(3)." Here appellant is not seeking to have the Tax Court declare that it is *qualified* to receive favorable treatment as an organization described in §501(c)(3); it is seeking to have the Tax Court declare that it is qualified to receive the even more favorable treatment under other provisions of the Code.

Accordingly, the order of the Tax Court dismissing the petition is AFFIRMED.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN
Clerk

ISSUED AS MANDATE: January 31, 1980
COSTS: Printing for the appellee. . . .
to be recovered from the appellant. . . .$100.85

APPENDIX C

SEC. 7428. DECLARATORY JUDGMENTS RELATING TO STATUS AND CLASSIFICATION OF ORGANIZATIONS UNDER SECTION 501(c)(3), ETC.

(a) Creation of Remedy—

In a case of actual controversy involving—

(1) a determination by the Secretary—

(A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2),

upon the filing of an appropriate pleading, the United States Tax Court, the United States Court of Claims, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification or with respect to such initial classification or continuing classification. Any such declaration shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Court of Claims, as the case may be, and shall be reviewable as such. For purposes of this section, a determination with respect to a continuing qualification or continuing classification includes any revocation of or other change in a qualification or classification.

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v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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OHIO COUNTY AND INDEPENDENT AGRICULTURE SOCIETIES, DELAWARE COUNTY FAIR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the order of the court of appeals in this federal income tax case affirming the Tax Court's dismissal of its suit for a declaratory judgment under Section 7428 of the Internal Revenue Code of 1954 (26 U.S.C.). The question presented is whether Section 7428 grants jurisdiction to the Tax Court to consider petitioner's action for a declaratory judgment to invalidate the Commissioner's ruling that petitioner was an exempt organization under Section 501(c)(3) of the Code and eligible for tax-deductible contributions under Section 170(c)(2).

The pertinent facts are as follows: In a ruling issued in 1960, the Commissioner of Internal Revenue determined that petitioner qualified for tax exemption as an educational organization described in Section 501(c)(3) of

the Code (Pet. App. B, 2a; A15).[1] The Commissioner continues to recognize petitioner as such an organization (A23, A37, A38). Seeking to avoid the tax imposed on the unrelated business income of Section 501(c)(3) organizations, petitioner brought this action in the Tax Court under Section 7428 of the Code for a declaratory judgment to establish its qualification as a state instrumentality described in Section 170(b)(1)(A)(v) of the Code (Pet. App. B, 2a; A2, A5).[2] Petitioner also filed with the Tax Court a separate petition for a redetermination of a deficiency, which similarly raises petitioner's eligibility for treatment as an organization described in Section 170(b)(1)(A)(v) (Pet. App. B, 2a). The Tax Court granted the Commissioner's motion to dismiss the action for a declaratory judgment for lack of jurisdiction on the ground that there was no actual controversy within the meaning of Section 7428 as to petitioner's continuing qualification for exemption under Section 501(c)(3) (Pet. App. A; A22-A24). The court of appeals affirmed *per curiam* (Pet. App. B).

The court of appeals correctly held that the Tax Court had no jurisdiction to consider petitioner's action for declaratory judgment under Section 7428 of the Code. In *Bob Jones University* v. *Simon*, 416 U.S. 725, 749-750 (1974), this Court observed that "an especially harsh regime" had been imposed on an organization which had

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[1]"A" refers to the separately bound record appendix filed in the court of appeals.

[2]Petitioner assumed that if it qualified as a state instrumentality it would be entitled to exclude its gross income from taxation pursuant to Section 115 of the Code and thereby avoid the tax on unrelated business income imposed by Section 511 *et seq.* of the Code (A6, A20; see A13-A19).

been denied a favorable tax-exemption ruling under Section 501(c)(3) and which was thus ineligible for advance assurance of deductibility of contributions under Code Section 170(c)(2). At that time, such an organization was precluded from obtaining immediate judicial review of such an advance ruling. Instead, it had to wait until it could petition the Tax Court for a redetermination of a deficiency, or until it paid the assessed tax and could sue for a refund.[3] In the meantime, the organization's donor support would often diminish and result in serious financial problems.[4] See also *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 763 n.14 (1974).

In order to relieve this hardship, Congress added Section 7428 to the Internal Revenue Code in 1976.[5] The statute was designed to allow an organization, in a case of actual controversy, to obtain a declaratory adjudication as to its initial or continuing qualification for exemption

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[3]See Sections 6212, 6213, 6532 and 7422 of the 1954 Code; 28 U.S.C. 1346, 1391.

[4]Most organizations seeking Section 501(c)(3) exemption rulings find it necessary, as a practical matter, to be listed in the Internal Revenue Service's "Cumulative List" (Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954 (Publication No. 78)) in order to assure potential contributors that their donations will qualify as charitable deductions under Section 170(c)(2) of the Code. See Rev. Proc. 72-39, 1972-2 Cum. Bull. 818. Consequently, as this Court recognized in *Bob Jones University* v. *Simon, supra*, 416 U.S. at 729-731, 749-750, the Commissioner's revocation of an organization's exempt status and concomitant withdrawal of advance assurance of deductibility may deprive the organization of necessary financial support before this action can be reviewed in a suit for refund or for redetermination of a deficiency.

[5]Section 7428 was added by Section 1306(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1717.

under Section 501(c)(3).[6] The accompanying House and Senate Committee Reports make clear that Section 7428 was enacted "[i]n order to provide an effective appeal from an Internal Revenue Service determination that an organization is not exempt from tax, or is not an eligible donee for charitable contributions." H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 282, 284 (1975); S. Rep. No. 94-938, 94th Cong., 2d Sess. 585, 587 (1976).

Contrary to petitioner's contention (Pet. 5), Congress did not intend Section 7428 to serve as a vehicle for contesting the Commissioner's favorable determinations recognizing an organization's exempt status under Section 501(c)(3) and its eligibility for tax deductible contributions under Section 170(c)(2). Section 501(c)(3) is therefore not at issue in this case. In reality, petitioner seeks a declaratory judgment that it is a state instrumentality under Section 170(b)(1)(A)(v) in order to qualify for the exclusion provided by Section 115(a) for income accruing to political subdivisions, and to circumvent the unrelated business income tax imposed by Section 511 *et seq.* (Pet. App. B; A6, A20, A26). But petitioner's right to be treated as a state instrumentality may properly be adjudicated only in a suit for refund or for redetermination of a deficiency.[7] Since the Commissioner has not

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[6]Section 7428(c) provides for assurance of deductibility for certain contributions made during the pendency of the adjudication.

[7]Indeed, because petitioner has raised the question as to its Section 170(b)(1)(A)(v) status in a pending Tax Court petition for redetermination of a deficiency, the present action could not appropriately be maintained even if it otherwise fell within the purview of Section 7428. Section 7428 is not designed to supplant the customary channels for litigating tax questions. The Committee Reports

revoked and, in fact, does not dispute petitioner's continuing eligibility as a Section 501(c)(3) organization and charitable donee, there is no controversy subject to review by the declaratory judgment procedures of Section 7428. See H.R. Rep. No. 94-658, *supra*; S. Rep. No. 94-938, *supra*; cf. *New Community Sr. Citizen Housing* v. *Commissioner*, 72 T.C. 372 (1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980

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accompanying Section 7428 state that, except upon a showing by the organization that substantial time would be conserved by permitting it to proceed under Section 7428, the courts will not entertain a declaratory judgment suit regarding a period for which a statutory notice of deficiency has already issued. A court which has accepted pleadings for a declaratory judgment must yield to a court which has accepted pleadings for a redetermination of a deficiency. H.R. Rep. No. 94-658, *supra*, at 286 (1975); S. Rep. No. 94-938, *supra*, at 588 (1976); joint Comm. on Taxation, General Explanation of the Tax Reform Act of 1976, 94th Cong., 2d Sess. 404 (1976), reprinted in 1976-3 Cum. Bull. (vol. 2) 416. Petitioner has failed to make the requisite showing.